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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE**

**In re GARY M., a Person Coming Under  
the Juvenile Court Law.**

**ALAMEDA COUNTY SOCIAL  
SERVICES AGENCY,  
  
Petitioner and Respondent,  
  
v.  
  
S.L.,  
  
Defendant and Appellant.**

**A142523**

**(Alameda County  
Super. Ct. No. SJ14023025)**

The juvenile court removed Gary M., Jr. (G.M.) from S.L.'s (mother) custody, awarded custody to presumed father, Gary M., Sr. (father) under a family maintenance plan, and denied mother reunification services pursuant to Welfare and Institutions Code section 361.5, subdivision (b)(11).<sup>1</sup> Mother appeals. She contends the court erred by

<sup>1</sup> Father is not a party on appeal and is mentioned only where necessary. Unless noted, all further statutory references are to the Welfare and Institutions Code. As relevant here, section 361.5, subdivision (b)(11) authorizes the juvenile court to bypass reunification services where there is clear and convincing evidence the parental rights of a sibling or half-sibling have been terminated and the parent has not made a reasonable effort to treat the problems that lead to the removal of that sibling or half-sibling from the parent.

removing G.M. from her custody and by denying her family maintenance services. She also contends insufficient evidence supports the denial of reunification services.

We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Mother and father (collectively, parents) lived together in a “committed relationship.” In February 2014, they moved from Oakland to San Leandro. G.M. was born in June 2014.

### *Detention*

A few days after G.M.’s birth, the Alameda County Social Services Agency (Agency) filed a section 300 petition. The operative petition alleged G.M. came within section 300, subdivision (b) because: (1) G.M. tested positive for cocaine at birth, and mother also tested positive, placing G.M. “in significant risk of physical harm[;]” (2) mother admitted “using cocaine while knowing she was pregnant, endangering [G.M.’s] welfare and placing [him] at significant risk of physical harm[;]” (3) mother had “a history of cocaine addiction and using cocaine during pregnancy[;]” (4) mother had a baby in 2010, and she and the baby tested positive for cocaine and her parental rights as to that child were terminated; and (4) father placed G.M. “at significant risk by minimizing [mother’s] drug use during pregnancy.” G.M. was detained in the hospital.

In its detention report, the Agency recommended detaining G.M. The Agency reported mother was offered family reunification services after she and her other son, V.S., Jr. (V.S.) “both tested positive for cocaine” when he was born in 2010 but those services—and mother’s parental rights—were terminated in 2011 because mother did not engage in her case plan or visit V.S. The Agency reported mother admitted using cocaine while pregnant with G.M. and had “yet to engage in any substance abuse treatment program.” Mother acknowledged using heroin until 2004. She also admitting using cocaine, which she blamed on “‘living in Oakland’ and the negative lifestyle she was in there.” Mother, however, claimed her “lifestyle” changed when she moved to San Leandro in February 2014, and she “was willing to do whatever [was] necessary” to reunify with G.M. Father was willing to have “mother move out of the home” if that

meant he could “have [G.M.] in his care.” At the conclusion of the detention hearing, the court determined: (1) removal was “necessary” under section 319; (2) “continuance” in mother and father’s home was “contrary to [G.M.’s] welfare[;]” (3) G.M.’s temporary placement and care was vested with the Agency; and (4) G.M. was detained but could be “released” to father at the Agency’s discretion.

### *Jurisdiction*

The Agency’s jurisdiction report recommended declaring G.M. a dependent and continuing the disposition hearing. The Agency noted G.M. was in a foster home; mother had begun outpatient drug treatment and “attended consistently.” Father reiterated his willingness to “work with the Agency” and do “whatever [was] necessary to care for his son,” including having mother move “out of the home so that [G.M.] can reside with him.” Mother was “also willing to move out of the home in order to support in-home orders with . . . father[.]” The Agency moved to continue the disposition hearing so father could have a “trial visit” with G.M.; it “hope[d] that Formal Family Maintenance will be the recommendation for . . . father, with informal services offered” to mother. Parents agreed with the Agency’s recommendations and submitted to jurisdiction. The court adjudged G.M. a dependent of the court (§ 300, subd. (b)) and gave the Agency discretion to arrange a trial visit between G.M. and father and “discretion to place [G.M.] in the home of . . . father when appropriate.” Mother moved out of the family home shortly after the jurisdictional hearing.

### *Disposition*

The Agency’s disposition report recommended declaring G.M. a dependent and placing him with father “under the supervision of . . . Family Maintenance Services.” The Agency noted parents agreed with the recommendations. G.M. was “on a trial visit” with father and was “doing well” in father’s “attentive” and “loving” care. The Agency also recommended denying mother reunification services under section 361.5, subdivision (b)(11).

At the dispositional hearing, the Agency reiterated its request for the court to declare G.M. a dependent, and “make official family maintenance orders” for G.M. and

father. In response, mother “submit[ted]” on the recommendation but urged the Court to not bypass her reunification services under section 361.5, subdivision (b)(11). According to mother, the Agency “provided . . . no evidence whatever as to efforts made by the mother to treat the problems that led to the removal” of V.S. “in that earlier action. [¶] . . . [T]he standard isn’t that the problem must be alleviated. And the fact that Mother may now be suffering from problems that were being suffered two years ago . . . with the sibling, is not the question. The issue is what efforts has she made between then and now to address that problem, and the [A]gency has failed to provide you any evidence of that.” In response, the Agency argued mother had not made a reasonable effort to treat the problems leading to V.S.’s removal because G.M. tested positive for cocaine at birth, just like V.S. According to the Agency, G.M.’s “positive tox screen” for an illegal substance constituted prima facie evidence mother had “not treated the problems” that led to V.S.’s removal.

The court determined by clear and convincing evidence G.M. “must be removed” from mother’s custody because of her “long-standing substance abuse history” and because she previously gave birth to a child that tested positive for cocaine and lost parental rights. The court concluded “mother has only just begun drug treatment and will need to make significant progress in her program.” The court ordered family maintenance services for father and denied mother reunification services pursuant to section 361.5, subdivision (b)(11), concluding by clear and convincing evidence mother had “not . . . made a reasonable effort to treat the problem” that led to V.S.’s removal. Finally, the court awarded custody to father, under the Agency’s supervision. The court set a review hearing for December 2014.

Mother appealed from the dispositional order. At the December 2014 status review hearing, the court concluded “[c]onditions do not exist which would justify initial assumption of jurisdiction under section 300 and are not likely to exist if supervision is

withdrawn.” The court terminated jurisdiction and dismissed the operative dependency petition, awarding sole custody of G.M. to father, with visitation for mother.<sup>2</sup>

## DISCUSSION

### I.

#### *Mother’s Appeal is Not Moot*

The Agency contends the appeal is moot because the court terminated dependency jurisdiction. We disagree. “As a general rule, an order terminating juvenile court jurisdiction renders an appeal from a previous order in the dependency proceedings moot. [Citation.] However, dismissal for mootness in such circumstances is not automatic, but ‘must be decided on a case-by-case basis.’ [Citations.] [¶] ‘An issue is not moot if the purported error infects the outcome of subsequent proceedings.’ [Citation.]” (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1488.) An appellate court ordinarily will not dismiss as moot a parent’s challenge to a jurisdictional finding if the purported error “could have severe and unfair consequences to [the parent] in future family law or dependency proceedings.” (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 716 (*Daisy H.*)).

Termination of dependency jurisdiction does not moot mother’s appeal because the court’s dispositional findings “if erroneous, could have severe and unfair consequences to [mother] in future family law or dependency proceedings.” (*Daisy H.*, *supra*, 192 Cal.App.4th at p. 716.) For example, the court’s denial of reunification services pursuant to section 361.5, subdivision (b)(11) could serve as a basis for denying mother services in a subsequent dependency proceeding. (§ 361.5, subd. (b)(10).) “[I]n an abundance of caution and because dismissal of the appeal operates as an affirmation of the underlying . . . order” we conclude the appeal is not moot. (*In re C.C.*, *supra*, 172 Cal.App.4th at p. 1489.)

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<sup>2</sup> Mother has appealed from the December 16, 2014 order dismissing dependency jurisdiction in case No. A144201. We take judicial notice of: (1) the December 16, 2014 order; (2) the January 6, 2015 “Custody Order—Juvenile—Final Judgment[.]” and (3) mother’s notice of appeal from the December 16, 2014 order. (Evid. Code, § 452, subd. (d).)

Several cases support our conclusion. (See *In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548 [dismissal of dependency did not preclude appellate review; refusing to address jurisdictional errors on appeal would have “the undesirable result of insulating erroneous or arbitrary rulings from review”]; *In re Cassandra B.* (2004) 125 Cal.App.4th 199, 208 [appeal from expired restraining order not moot where underlying issues could affect pending dependency proceedings]; *In re Hirenia C.* (1993) 18 Cal.App.4th 504, 517-518 [dismissal of dependency did not moot appeal].) The Agency’s reliance on *In re Michelle M.* (1992) 8 Cal.App.4th 326 (*Michelle M.*) does not alter our conclusion. In *Michelle M.*, the juvenile court terminated dependency jurisdiction and the father did not appeal. (*Id.* at pp. 327-328.) Here, mother *has* appealed from the termination of dependency jurisdiction in appeal No. A144201. As a result, *Michelle M.* is distinguishable. (See *In re J.S.* (2011) 199 Cal.App.4th 1291, 1295 [appeal not moot despite dismissal of dependency where parties appealed orders granting custody to mother and denying father visitation].)

## II.

### *Mother Forfeited Her Challenge to G.M.’s Removal and Cannot Establish Ineffective Assistance of Trial Counsel*

Mother claims the court’s orders removing G.M. from her custody and bypassing reunification services must be reversed because: (1) there was no basis to remove G.M. from her care under section 361; (2) father “was not a ‘previously non-custodial parent’” under section 361.2, subdivision (a); and (3) when G.M. returned to father’s home, “the case became a family maintenance case” and “there was no statutory basis” for the court to bypass reunification services under section 361.5, subdivision (b).

The Agency contends mother forfeited this argument because she did not raise it in the juvenile court. “In dependency litigation, ‘[a] party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court. [Citations.]’ [Citation.]” (*In re T.G.* (2013) 215 Cal.App.4th 1, 14 (*T.G.*)). “The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so any error may be corrected. [Citation.]” (*In re Nickolas T.* (2013) 217

Cal.App.4th 1492, 1500.) We “agree with the Agency that [mother] has forfeited the argument [she] raises on appeal.” (*T.G.*, *supra*, 215 Cal.App.4th at p. 13.)

Mother was fully aware of the Agency’s recommendations before the jurisdictional hearing and agreed with them, including the recommendation to provide father with family maintenance services. She also submitted to jurisdiction. Before the dispositional hearing, the Agency recommended placing G.M. with father under the supervision of family maintenance services and mother agreed with those recommendations. At the dispositional hearing, the Agency reiterated its request for providing father with family maintenance services, and mother “submit[ted]” on the recommendations. “Not once did [mother’s] trial counsel argue” G.M.’s removal was improper, that there were reasonable alternatives to removal, that she was entitled to family maintenance services, or that father was not a noncustodial parent under section 361.2. (*T.G.*, *supra*, 215 Cal.App.4th at p. 13.) Under the circumstances, mother has forfeited these arguments on appeal. (*In re A.A.* (2012) 203 Cal.App.4th 597, 604 [failure to object to noncompliance with section 361.2 results in forfeiture]; *In re Cynthia C.* (1997) 58 Cal.App.4th 1479, 1484, fn. 5 [objection to removal order waived by failure to challenge below]; *In re Kevin S.* (1996) 41 Cal.App.4th 882, 885 [mother forfeited argument that court failed to make finding regarding reunification services where argument “was not raised in the superior court”]; *In re A.B.* (2014) 225 Cal.App.4th 1358, 1366.)

In her reply brief, mother contends “‘application of the forfeiture rule is not automatic.’” (*T.G.*, *supra*, 215 Cal.App.4th at p. 14, quoting *In re S.B.* (2004) 32 Cal.4th 1287, 1293 (*S.B.*)). Mother is correct, but our high court has cautioned that “[a]lthough an appellate court’s discretion to consider forfeited claims extends to dependency cases . . . the discretion must be exercised with special care. . . . ‘Dependency proceedings in the juvenile court are special proceedings with their own set of rules, governed, in general, by the Welfare and Institutions Code.’ [Citation.] Because these proceedings involve the well-being of children, considerations such as permanency and stability are of

paramount importance. [Citation.]’ ” (*S.B.*, *supra*, 32 Cal.4th at p. 1293, quoting *In re Chantal S.* (1996) 13 Cal.4th 196, 200.)

We decline to exercise our discretion to consider mother’s claims. This case does not raise “an important constitutional issue” (*T.G.*, *supra*, 215 Cal.App.4th at p. 14), nor a pure question of law.<sup>3</sup> Mother’s reliance on *In re Abram L.* (2013) 219 Cal.App.4th 452 (*Abram L.*) is misplaced. There, the father argued the juvenile court failed to make a finding required by section 361.2 that placing his children in his care would be detrimental to them. (*Abram L.*, *supra*, at p. 460.) In response, the department argued the father forfeited the argument that the “court failed to apply or comply with section 361.2 because he did not raise the issue below.” (*Id.* at p. 462.)

The appellate court rejected this argument and explained, “father did not forfeit appellate review of whether the juvenile court failed to apply or comply with section 361.2. The arguments raised by father are primarily issues of law. Further, at the dispositional hearing, father’s counsel argued that the Department did not meet its showing that placing the children in father’s custody ‘would create a substantial risk of detriment.’ This argument appears to be based on section 361.2, subdivision (a). Under these circumstances, we decline to hold that father, a nonoffending and noncustodial parent, forfeited his arguments regarding his constitutionally protected interest in assuming physical custody over his children.” (*Abram L.*, *supra*, 215 Cal.App.4th at p. 462.) *Abram L.* is distinguishable, because this not a situation where the court failed to make a finding required by section 361.2. Mother is not a noncustodial parent, and she did not make any arguments based on sections 361 or 361.2, nor suggest the court’s application of these statutes was somehow erroneous.

Mother contends she was denied effective assistance of counsel if this claim is forfeited. “[T]he burden is on [mother] to establish both that counsel’s representation fell

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<sup>3</sup> Mother does not challenge the sufficiency of the evidence supporting the removal order. A claim that the evidence is insufficient to support a dispositional order is not forfeited even if not raised in the dependency court. (*In re R.V., Jr.* (2012) 208 Cal.App.4th 837, 848-849.)

below prevailing professional norms and that, in the absence of counsel’s failings, a more favorable result was reasonably probable.” (*In re Daisy D.* (2006) 144 Cal.App.4th 287, 292-293 (*Daisy D.*)) Mother’s argument regarding prejudice is one sentence: she claims there is a reasonable probability “the court would have . . . entered different orders” resulting in a more favorable outcome had her counsel objected at the dispositional hearing. Mother does not identify what those “orders” would be, nor the more favorable result. We need not evaluate trial counsel’s advocacy because mother has failed to establish counsel’s alleged incompetence was prejudicial. (*In re M.D.* (2014) 231 Cal.App.4th 993, 1003; *Daisy D.*, *supra*, 144 Cal.App.4th at pp. 293-294.) We reject mother’s ineffective assistance of counsel claim.

### III.

#### *Substantial Evidence Supports the Denial of Reunification Services*

Mother claims insufficient evidence supports the order denying reunification services under section 361.5, subdivision (b)(11). Under that statute, reunification services need not be provided to a parent when the juvenile court finds by clear and convincing evidence the “parental rights of a parent over any sibling or half sibling of the child had been permanently severed . . . and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent.” (§ 361.5, subd. (b)(11).) We uphold the order denying reunification services if supported by substantial evidence. (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96 (*Cheryl P.*)) “In making this determination, . . . all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. [Citations.]” (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75 (*Jasmine C.*))

There is substantial evidence mother had not made reasonable efforts to treat the problems leading to V.S.’s removal. In 2010, V.S. tested positive for cocaine at birth and was removed from mother’s custody. Four years later, G.M. tested positive for cocaine at birth. Mother admitted a history of cocaine use, including while she was pregnant with G.M. According to the detention report, mother did not “engage in any substance abuse

treatment program” before G.M. was born. Evidence of mother’s continuing drug use—and her failure to attend a substance abuse treatment program after V.S. was removed—constitute clear and convincing evidence mother had not made reasonable efforts to treat the problems that led to removal of V.S. (*Jasmine C.*, *supra*, 70 Cal.App.4th at p. 76 [mother, a chronic substance abuser, was incarcerated; evidence of mother’s “reoffending” established she did not make a “reasonable effort” under section 361.5, subdivision (b)(10)].) We conclude sufficient evidence supports the court’s denial of reunification services under section 361.5, subdivision (b)(11).

Mother contends the denial of reunification services must be reversed because the Agency did not adequately investigate “efforts [she] may have made” to treat her substance abuse problem after V.S. was removed. We are not persuaded. Mother does not identify what efforts she supposedly made to treat her substance abuse problem, and the evidence in the record demonstrates any efforts mother might have made were not “reasonable” under section 361.5, subdivision (b)(11). Mother told the Agency “her lifestyle . . . changed” after she moved to San Leandro in February 2014, a few months before G.M. was born, but she admitted using cocaine a week before G.M. was born, and she had not attended a substance abuse treatment program after her parental rights as to V.S. were terminated. (*Cheryl P.*, *supra*, 139 Cal.App.4th at p. 99 [“reasonable efforts” do not include “lackadaisical or half-hearted efforts”]; *R.T. v. Superior Court* (2012) 202 Cal.App.4th 908, 914-915 [“reasonable effort” does not mean “any effort by a parent, even if clearly genuine” and “measure of success achieved is properly considered a factor in the juvenile court’s determination of whether an effort qualifies as reasonable”].)

Mother also argues the court erred by denying reunification services because it was in G.M.’s “best interest for [her] to participate in, and successfully complete, a drug treatment program.” When the prerequisites of the bypass provisions in section 361.5, subdivision (b)(11) are met, the court “shall not” order reunification services for the parent unless it “finds, by clear and convincing evidence, that reunification is in the best interest of the child.” (§ 361.5, subd. (c).) Thus, “[o]nce it is determined one of the situations outlined in [section 361.5,] subdivision (b) applies, the general rule favoring

reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources. [Citation.]” [Citation.] The burden is on the parent to change that assumption and show that reunification would serve the best interests of the child.” (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.) Mother’s argument fails because she presented no evidence in the juvenile court to demonstrate reunification was in G.M.’s best interest.

#### DISPOSITION

The jurisdictional and dispositional orders are affirmed.

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JONES, P.J.

WE CONCUR:

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NEEDHAM, J.

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BRUINIERS, J.